

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

NICHOLAS A. DAVIS,)	
)	
Plaintiff,)	
vs.)	NO. CIV-08-0550-HE
)	
OKLAHOMA COUNTY, ET AL.,)	
)	
Defendants.)	

ORDER

Plaintiff Nicholas A. Davis, a state prisoner appearing *pro se* and *in forma pauperis*, instituted this action under 42 U.S.C. § 1983, alleging violations of his constitutional rights. Consistent with 28 U.S.C. § 636(b)(1)(B), the matter was referred for initial proceedings to Magistrate Judge Robert E. Bacharach. He has recommended, with respect to the plaintiff's claims against defendant Joe Hatherly in his personal capacity,¹ that some be dismissed and summary judgment entered in the defendant's favor on the others. Specifically, the magistrate judge recommends that the court sua sponte dismiss with prejudice the plaintiff's claims related to the inmate assault as being time-barred. He recommends that summary judgment be entered in favor of defendant Hatherly on the plaintiff's remaining claims pertaining to alleged deliberate indifference to serious medical needs, due to nonexhaustion of available administrative remedies.

The plaintiff objects to the Report and Recommendation, contending that his claims

¹The claims against defendant Hatherly in his official capacity are addressed in a separate order [Doc. #91].


against defendant Hatherly are timely as they relate back to the filing of the initial complaint. The plaintiff asserts that he did not name Hatherly as a defendant initially because he was no longer employed at the Oklahoma County Jail at the time the complaint was filed and the plaintiff did not know his address or where to serve him. The plaintiff also argues that Hatherly was, in effect, named as a defendant in the initial complaint because it included allegations of his misconduct and because Hatherly was a county employee and the County was a named defendant.

The plaintiff has not shown “the action would have been brought against (Hatherly), but for a mistake” concerning his identify. Fed.R.Civ.P. 15(c)(1)(C). Therefore the second amended complaint did not relate back to the original complaint with respect to the plaintiff’s claims against defendant Hatherly. Also, despite his being a county employee, Hatherly was not implicitly included as a defendant when the plaintiff sued Oklahoma County or based his claims on Hatherly’s conduct.

Accordingly, the court adopts Magistrate Judge Bacharach’s Report and Recommendation. The plaintiff’s claims against defendant Hatherly in his individual capacity that relate to the September 24, 2006, assault are dismissed with prejudice. Summary judgment is granted in defendant Hatherly’s favor on the plaintiff’s medical claims asserted against him in his individual capacity.

IT IS SO ORDERED.

Dated this 23 day of Nov., 2009.



JOE HEATON
UNITED STATES DISTRICT JUDGE